

The Public Trust Group

dedicated to promoting
an ecologically and socially healthy California
through application of the Public Trust Doctrine.

September 22, 2004

Governor Arnold Schwarzenegger
State Capitol Building
Sacramento, CA 95814

RE: California Performance Review Recommendations on the State Lands Commission

Dear Governor Schwarzenegger:

The Public Trust Group is a California public interest organization initiated in September 1995 that is committed to protecting Public Trust interests. The Public Trust Group is committed to carrying out the research, public education, and vigorous public advocacy necessary to (i)ensure active involvement of the public in decisions that affect application of the Public Trust; (ii)ensure that agencies responsible for implementing Public Trust purposes obtain the resources and support to fully implement the law, and (iii)promote Public Trust land use decisions that meet pressing needs for ecologically, socially and economically sustainable development.

Changes to the State Lands Commission recommended by the California Performance Review would undermine the Public Trust.

The California Performance Review (CPR) Report recommends that the Governor

- ◆ Shift responsibility for the protection of Public Trust lands from elected officials to the State bureaucracy through elimination of the State Lands Commission; and
- ◆ Disperse responsibilities of staff to the State Lands Commission, among the Natural Resources Department, Environmental Protection Department, and the Infrastructure Department.

The Public Trust Group strongly opposes these recommendations because they jeopardize the State's commitment to upholding Public Trust Doctrine that is enshrined the California Constitution.

Contrary to CPR stated goals, the recommended change in governance would erode the public's ability to hold accountable those responsible for the management of Public Trust lands. Dispersing Public Trust staff responsibilities to departments with other priorities would unavoidably undermine the State's commitment to Public Trust Doctrine. This action would also result in expensive duplication of capacity by requiring three departments rather than one to sustain highly specialized knowledge of and experience implementing Public Trust law.

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Termination of the State Lands Commission is inconsistent with CPR stated objectives.

The State Lands Commission, which is comprised of two statewide elected officials and one appointee of the Governor, currently holds public hearings and makes decisions about Public Trust lands in a public forum. The authors of the CPR Report do not explain why they believe that decisions concerning the Public Trust would be better made in the bowels of the bureaucracy, where they would not be subject to public comment and scrutiny.

The authors of the Report do not justify this recommendation to the people of California. The Report states only "Eliminate this Commission as it is duplicative of other functions within state government." This conclusion is false. The State Lands Commission does not duplicate the work of any other body that is accountable to voters. The explanation by CPR authors portrays a change in governance as if it were merely the reassignment of bureaucratic responsibilities.

The authors of the CPR would have done better to consider serious answers to the questions they claim to have asked before recommending elimination of the State Lands Commission:

- ◆ What was the chief purpose for creating the board or commission?
- ◆ What are the chief powers and duties of the board or commission?
- ◆ What costs are associated with this entity?
- ◆ Are there other entities that logically should perform the functions of the entity?
- ◆ Must this duty be performed by an autonomous body?

We would like to provide you with the answers that CPR authors have disregarded.

What was the chief purpose for creating the State Lands Commission?

The California Legislature created the California State Lands Commission in 1938, in response to the discovery of corruption and fraudulent practices in management of the oil, gas and other mineral resources belonging to the state.

The Legislature established the Commission as an independent entity with a membership of accountable, elected officials to prevent future abuse. The State Lands Commission is composed of the Lieutenant Governor and State Controller, both statewide elected officials, and the Director of Finance, an appointee of the Governor, to manage and protect the state's school and sovereign lands (i.e. the beds of all naturally navigable rivers, lakes, and streams, as well as the state's tide and submerged lands along the state's more than 1,100 miles of coastline)

To abolish the Commission now, with its accountable practices and structure, risks a return to the pre-1938 conditions that spurred its creation.

What are the chief powers and duties of the State Lands Commission?

The Legislature has given the California State Lands Commission authority over California's sovereign lands – lands under navigable waters. These are lands to which California received title upon its admission to the Union and that are held by virtue of its sovereignty. These lands are also known as Public Trust lands. The Commission administers Public Trust lands pursuant

to statute and the Public Trust Doctrine – the common law principles that govern use of these lands.

What costs are associated with the State Lands Commission?

Costs associated with the State Lands Commission as the decision-making body are insignificant. The three commissioners are state officials. Their service is included among their official duties. If the CPR recommendations are adopted, decisions would be made by other state officials as part of their duties.

The costs of staffing the State Lands Commission have been modest (in part because the Commission has been understaffed). These costs would be increased, rather than decreased, if these functions were to be reproduced in three separate departments. (See our comments below on dispersal of staffing responsibilities.)

Are there other entities that logically should perform the functions of the State Lands Commission?

No. Requirements for the management of Public Trust lands are substantially different from those related to any other state real estate assets. The Public Trust is an affirmation of the duty of the state to protect the people's common heritage of tide and submerged lands for their common use.¹

More than a century ago the United States Supreme Court confirmed that a state's title to its tide and submerged lands is different from that of other lands it holds. "It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing" free from obstruction or interference from private parties.²

Although courts have reviewed tidelands trust issues many times since that landmark Supreme Court opinion, the premise of the unique nature of a state's title to its tide and submerged lands remains fundamentally unchanged.

Must this duty be performed by an autonomous body?

Yes. Since the California Constitution and Public Trust law prioritize the long term value of Public Trust lands for all Californians, management decisions must be shielded from day-to-day pressures and crises that drive decisions of the state bureaucracy. Although no institutional structure by itself can promise to deliver decisions focused on future benefit, the record of the State Lands Commission demonstrates that an accountable commission acting as trustee for the long term interests of all Californians has performed well, in no small part because their decisions have been subject to public scrutiny.

¹*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 441.

²*Illinois Central R.R. Co. v Illinois* (1892) 146 U.S. 387, 452.

Dispersal of staff responsibilities would diminish accountability, confuse prioritization, and impair coordination.

In addition to recommending elimination of the State Lands Commission, the CPR Report also recommends splitting the work performed by Commission staff among three departments. This recommendation is inconsistent with the principles that CPR purportedly followed.

In addressing problems facing the organization of the State bureaucracy, the CPR Report identifies three general problems: lack of accountability, lack of prioritization; and lack of coordination. It is astonishing, therefore, that the CPR recommends scattering work now being performed by State Lands Commission staff to three separate departments since these changes would

- ◆ Reduce accountability for implementation of Public Trust law by dividing currently integrated responsibilities, in addition to eliminating public review;
- ◆ Confuse and weaken the priority of long term Public Trust values by locating responsibility for them in departments where they must compete with shorter term objectives; and
- ◆ Destroy the coordination of responsibility for complex tidelands issues that is the hallmark of the State Lands Commission staff.

The CPR Report further advises, “Similar and related activities should be brought together to identify duplication of roles and share best practices. This will improve the effectiveness, impact and overall performance and productivity of state government..” Even though the authors invoke this objective of aligning programs by function, their recommendation to disperse the functionally inter-related activities of the State Lands Commission staff to three departments moves in the opposite direction.

Even the text of the Report demonstrates that the recommendations would split up State Lands Commission functions that are now well integrated.

Maritime facilities responsibilities should be transferred to the Department of Environmental Protection. **Mineral leasing activities should be split.** Mineral leasing activities related to energy production should be transferred to the Division of Energy within the California Infrastructure Department. Those related to non-energy commodities (gold, silver, etc.) should be conducted by the Department of Natural Resources. **The land management function of the State Lands Commission should also be split** to more appropriately align with departmental activities.

We urge rejection of CPR recommendations.

As an organization dedicated to the integrity of the Public Trust in California, we perceive that the effect, even if not the intention of these recommendations would be the weakening of Public Trust values rather than their more efficient pursuit. A similar re-organization was considered but rejected by the Little Hoover Commission in 1995 after they understood the ramifications of the change.

It is unfortunate that the authors of these ill-advised changes to the State Lands Commission did not contact us or other members of the public who are committed to strong implementation of Public Trust law. We strongly urge you to reject these recommendations.

Please let us know if we can be of any assistance.

Yours truly,

Eve Bach
President

Cc: California Performance Review Commission

Majority Leader Don Perata

Assembly Speaker Fabian Núñez

State Lands Commission

State Lands Commission Executive Officer, Paul Thayer,